

The record and stipulations, as specifically set forth in the Award of the Administrative Law Judge, are herein adopted by the Appeals Board.

ISSUES

What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge assessed 100 percent of the liability in this matter to the Kansas Workers Compensation Fund, finding that, per the opinion of Philip R. Mills, M.D., claimant would not have had her present injury “but for” the injury in August 1993. The Appeals Board finds the opinion of the Administrative Law Judge should be affirmed and 100 percent of the liability should be assessed against the Kansas Workers Compensation Fund.

Claimant was, an employee with respondent, Casco, Inc., as a forklift driver, and was originally injured in August 1993 when a forklift struck the table where claimant was sitting. Claimant was pinned between the table and a metal stool, suffering injury to her low back, left hip, and left leg. Claimant missed two to three weeks of work, underwent medical treatment, including physical therapy for several weeks, and was ultimately returned to work. It is significant that at the time claimant was returned to work, after this first injury, she continued to suffer symptoms in her low back, left hip, and left leg. Claimant went so far as to request an additional medical opinion from respondent, but same was denied. Claimant continued to work even though at times in pain, until March 23, 1994, when she suffered an aggravation of this preexisting problem while lifting a tackle box. Claimant described the second injury as occurring in the same area of the body; although, this time the pain was more severe and more constant.

Claimant was again referred for medical treatment ultimately being referred to Dr. Philip R. Mills, a physiatrist. Dr. Mills treated claimant with several weeks of physical therapy after having diagnosed trochanteric bursitis and LS sprain. He ultimately assessed claimant a five percent functional impairment for the injuries suffered.

Subsequent to the August 1993 injury, respondent filed a Form 88 with the Division of Workers Compensation on September 3, 1993, indicating lumbar strain as a preexisting handicap. K.S.A. 44-567(b) states in pertinent part:

“If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or

retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment.”

The filing of an Form 88 by respondent in September 1993 created a presumption of knowledge of this preexisting impairment. No evidence was presented to contradict this presumption.

K.S.A. 44-567(a)(1) states:

“Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund;”

The testimony of claimant supports respondent’s contention that claimant’s injury was an aggravation of her original injury in 1993. Claimant stated that the second injury in March 1994 was in the same place, only more severe and more constant. Dr. Philip Mills, the only health care provider to testify in this matter, stated that claimant would not have her present injury “but for” the injury in August 1993.

This testimony of Dr. Mills is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. Supp. App. 2d 191, 558 P. 2d 146 (1976). The Appeals Board finds the uncontradicted medical evidence of Dr. Mills and the equally uncontradicted testimony of the claimant support a finding that claimant was physically impaired subsequent to the injury of August 1993 and that this impairment constituted a handicap in claimant’s ability to obtain or retain employment and the Kansas Workers Compensation Fund should be assessed 100 percent of the liability in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated December 16, 1996, should be, and is hereby affirmed and 100 percent of this Award is assessed against the Kansas Workers Compensation Fund and none against respondent.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund and to be paid as follows:

Ireland Court reporting	
Deposition of Philip R. Mills, M.D.	\$351.40
Transcript of regular hearing	\$353.25

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Norman I. Cooley, Wichita, KS
Douglas D. Johnson, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director